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In The

# Supreme Court of the United States

October Term, 1988

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OLAF A. HALLSTROM and
MARY E. HALLSTROM,

*Petitioners,*

v.

TILLAMOOK COUNTY,
a municipal corporation,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

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## RESPONDENT'S BRIEF

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[redacted]

## QUESTION PRESENTED

Is the 60-day notice requirement of the Resource Conservation and Recovery Act of 1976 ("RCRA") (42 U.S.C. § 6901 *et seq.*) a jurisdictional prerequisite to a citizen's suit [such as that filed by Petitioners ("the Hallstroms")] brought under the Act?

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## RESPONDENT'S BRIEF

## OPINION BELOW

The Amended Opinion of the Court of Appeals is reported at 844 F.2d 598 (1988). (J.A. 87-96)

## STATUTE INVOLVED

The pertinent portion of RCRA involved in this matter (42 U.S.C. § 6972) is set forth in Appendix "A" to this Brief.

## STATEMENT OF THE CASE

The Hallstroms own land near Respondent Tillamook County's ("the County") landfill. The County operates the landfill under a permit issued by the Oregon Department of Environmental Quality ("DEQ"). (J.A. 4, 11, 60, 61) Prior to April 1981, the Hallstroms became concerned that contaminated ground and surface water from the landfill was polluting their property. In April 1981, the Hallstroms sent a written notice to the County claiming violations of state and federal law and stating their intention to file a lawsuit. (J.A. 26-27, 38-39, 61)

In April 1982, the Hallstroms filed a lawsuit in federal court under the citizen-suit provision of RCRA Section 7002(a) [42 U.S.C. § 6972(a)]. The Hallstroms claimed violations of standards governing landfill operation established under RCRA and they also asserted pendent state claims for damages for inverse condemnation, trespass and nuisance. (J.A. 1, 3-10, 58-59, 61)

In their Complaint, the Hallstroms specifically alleged that "[m]ore than 60 days prior to the commencement of this action, plaintiffs served a notice of intent to file a citizen's suit pursuant to [RCRA]." (J.A. 5) However, in January 1983 the County learned that the Hallstroms had not given that required notice to either the



Environmental Protection Agency ("EPA") or to the DEQ as required by RCRA [42 U.S.C. § 6972(b)(1)]. (J.A. 22-25, 41) Consequently, the County moved for Summary Judgment and asked that the lawsuit be dismissed because of the Hallstroms' failure to give the required notice. (J.A. 1, 15) Immediately after receiving the County's Motion for Summary Judgment, and nearly one year after their lawsuit was filed, the Hallstroms gave notice for the first time to the EPA and DEQ.[1] (J.A. 27-28, 40-41, 61)

In April 1983, the district court denied the County's Motion for Summary Judgment. (J.A. 1, 56-57) Following a trial and the entry of a Final Judgment and Decree (J.A. 74-86), the Hallstroms appealed certain rulings made by

[1] The Hallstroms contend that "[f]or at least a year and a half before the Hallstroms filed this citizen suit, DEQ had actual knowledge of the violations and sent several enforcement letters to [the] County." (Op. Br. 7) The Hallstroms also quote from what they characterize as a "chronology that DEQ prepared." (Op. Br. 7-8) That "chronology" does not suggest, much less establish, that the DEQ or EPA had any notice that the Hallstroms intended to file a citizen suit under RCRA prior to the actual commencement of that action. (The "events" in the "chronology" do not relate to the Hallstroms' property at all but instead pertain to conditions at the County landfill and possible violations of the DEQ operating permit.) Indeed, the undisputed evidence is that neither the DEQ nor the EPA became aware of the alleged RCRA violations until after the Hallstroms had commenced this action. (J.A. 22-25, 27, 35-37) In any event, the Hallstroms have not asserted at any prior point in these proceedings that the DEQ and EPA had actual notice of alleged RCRA violations by the County prior to the commencement of the Hallstroms' citizen suit. The Hallstroms cannot make that argument for the first time before this Court. *See Price Waterhouse v. Hopkins*, ___ U.S. ___, 109 S. Ct. 1775, 1785 n. 5 (1989).

the district court in connection with their RCRA claim and claims based on state law.[2] The County cross-appealed from the denial of its Motion for Summary Judgment. (J.A. 87)

The Court of Appeals reversed the ruling of the district court on the RCRA notice requirement and remanded the case to the district court to be dismissed. The Court of Appeals ruled that the RCRA 60-day notice requirement is a jurisdictional prerequisite to bringing a citizen suit under RCRA. Because the Hallstroms failed to notify the EPA and DEQ before filing their lawsuit, the Court of Appeals ruled that the district court lacked subject-matter jurisdiction to hear the lawsuit. (J.A. 87-96)

## SUMMARY OF ARGUMENT

The Hallstroms asserted the existence of a federal question under RCRA as their basis for federal subject-matter jurisdiction. The provisions of RCRA that permit enforcement of that Act by private citizens specifically confer jurisdiction in the district courts. However, the same provisions require that the plaintiff-citizen must first give 60 days' advance notice of the intent to sue to

[2] As a result of the trial, the district court refused to grant the injunctive relief sought by the Hallstroms of permanent closure of the County landfill. Instead, the district court ordered the County to submit a proposal to ensure that all leachate generated by the landfill would be contained within the boundaries of the County landfill in the future. (J.A. 74-86) In addition, the jury found in favor of the County on the Hallstroms' state-law claims. (J.A. 75, 85-86)



the EPA and to the coordinate state agency responsible for enforcing RCRA. Citizen suits are prohibited until that requirement is met. It is undisputed that the 60-day notice required by RCRA was not given to the EPA and DEQ by the Hallstroms prior to commencing their lawsuit. Consequently, the district court lacked subject-matter jurisdiction over the lawsuit.

The RCRA notice provision does not provide, as the Hallstroms contend, that a citizen-plaintiff may file a RCRA claim and *then* give the proper notice so long as the court does not rule on the plaintiff's claim for 60 days. While such a statutory scheme *may* have been possible, that is not the scheme that Congress adopted.

Congress deliberately chose a hierarchy of preferred responses to a claimed RCRA violation: (1) voluntary compliance by the alleged violator, (2) enforcement action by the EPA or the coordinate state agency, and, only as a last resort, (3) a private lawsuit by a citizen-plaintiff. Congress consciously included the notice obligation in RCRA to implement that choice.

The RCRA notice requirement is not a mere procedural technicality, but an essential component of the overall statutory scheme. By requiring prior notice, Congress ensured that there would be a meaningful opportunity for voluntary compliance and agency enforcement *before* any private litigation is filed.

The Hallstroms' construction of RCRA would save their lawsuit from dismissal. However, it defeats a fundamental purpose of the legislation.

## ARGUMENT

**The failure of the Hallstroms to comply with the 60-day notice requirement in RCRA before filing their lawsuit deprived the district court of jurisdiction over the lawsuit.**

Congress has authorized citizens to enforce RCRA standards through civil litigation since RCRA was originally enacted in 1976. A citizen-plaintiff, however, is required to give notice of intent to sue to the alleged violator of RCRA and to the federal and state environmental agencies at least 60 days prior to the commencement of the citizen's civil action. The citizen who commences an action without first satisfying the statutory requirements fails to properly invoke RCRA as a basis of federal subject-matter jurisdiction.[3]

Based on the plain, unambiguous language of the RCRA notice provision, underlying legislative history and the separation of powers doctrine, the Hallstroms' failure to comply with the 60-day notice requirement in

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[3] A citizen's failure to properly invoke RCRA as a basis of federal jurisdiction has no effect on other remedies available to the citizen. *See* 42 U.S.C. § 6972(f), which provides:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator [of the EPA] or a State agency).

*See, e.g., Parola v. Weinberger*, 848 F.2d 956, 959 (9th Cir. 1988).



RCRA constituted a jurisdictional defect and compelled a dismissal of the Hallstroms' lawsuit.

### A. The plain, unambiguous language of the RCRA notice provision prohibits the commencement of a citizen suit before the citizen has complied with explicit notice and waiting-period requirements.

The plain meaning of the RCRA 60-day notice requirement is clear. It is a jurisdictional prerequisite to the commencement of a citizen suit. It is not, as the Hallstroms and Amici[4] erroneously contend, merely a procedural requirement subject to equitable modification. The Hallstroms and Amici strain to argue that the RCRA notice requirement means something other than what it clearly says – a citizen suit is "prohibited" and cannot be commenced unless, at least 60 days prior to the commencement of the suit, the citizen-plaintiff has given notice of the claimed RCRA violations to the EPA and coordinate state agency.

#### 1. The requirements for maintaining a citizen suit under RCRA are jurisdictional.

Significantly, the pertinent portion of the notice provision in RCRA is captioned "Actions prohibited"[5] and

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[4] Amici Curiae Sierra Club, Defenders of Wildlife, Inc., National Audubon Society, Natural Resources Defense Council, Inc., and the Wilderness Society ("Amici") filed an Amici Curiae Brief ("Am. Br.") with this Court in support of the Hallstroms.

[5] 42 U.S.C. § 6972(b).

states in unambiguous terms that "[n]o action may be commenced" until 60 days after the citizen notifies the EPA, the state in which the alleged violation occurs, and the alleged violator. 42 U.S.C. § 6972(b)(1). Under Fed. R. Civ. P. 3, "[a] civil action is commenced by filing a complaint with the court." Thus, read together, RCRA and Fed. R. Civ. P. 3 prohibit a citizen from "filing a complaint" until the notice and waiting-period requirements in RCRA have been satisfied.

A federal court has no subject-matter jurisdiction to act on any aspect of a lawsuit until a complaint has been filed and an action "commenced." Accordingly, Congress' explicit "prohibition" of the commencement of a citizen suit under RCRA prior to compliance with the statutory notice requirement demonstrates that Congress intended that requirement to have jurisdictional significance.[6]

**2. The explicit language of the RCRA notice provision is controlling.**

As the Hallstroms even acknowledge (Op. Br. 20), "the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *accord Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 108 S. Ct. 376, 381 (1987). The plain, unambiguous language of a statute ordinarily must be regarded as conclusive. *See Burlington Northern v. Oklahoma Tax Comm.*, 481 U.S. 454, 461 (1987).

[6] The Hallstroms (Op. Br. 37) and Amici (Am. Br. 24-25) erroneously contend that the County lacks standing to assert the lack of subject-matter jurisdiction based on the absence of notice to the EPA and DEQ. That argument ignores this Court's recent decision in *U.S. Catholic Conference v. Abortion Rights*, ___ U.S. ___, 108 S. Ct. 2268, 2270-71 (1988), in which this Court held that courts have finite bounds of authority which are fixed by the limits of their jurisdiction and that even nonparties may object when those boundaries are crossed.



This Court has repeatedly recognized that when the terms of a statute are unambiguous, judicial inquiry generally is complete. *See e.g. Rubin v. United States*, 449 U.S. 424, 430 (1981). Indeed, this Court generally assumes that the legislative purpose of a statute is expressed by the ordinary meaning of the statute's language. Accordingly, a literal reading of statutory language generally is the only proper reading. *See United States v. Locke*, 471 U.S. 84, 93-95 (1985).

The notice requirement in RCRA is unambiguous. A citizen suit is "prohibited" and may not be "commenced" until the citizen has satisfied the explicit notice requirements set forth in the Act. Congress could not have provided in clearer terms what steps a citizen must take before commencing a civil action under RCRA. The unequivocal clarity of the notice requirements in RCRA and other federal environmental statutes led the Court of Appeals in this matter to conclude that "[a]nything other than a literal interpretation of the 60-day notice requirement . . . would effectively render those provisions worthless." *Hallstrom v. Tillamook County*, 844 F.2d 598, 601 (1988).

The Court of Appeals in this matter correctly ruled that the 60-day notice requirement is jurisdictional based on the "plain language" of RCRA:

> [Senior Circuit] Judge Wisdom wrote, "The plain language of § 6972(b) commands sixty days' notice before commencement of the suit. To accept anything less 'constitutes, in effect, judicial amendment in abrogation of explicit, unconditional statutory language.'" *Garcia [v. Cecos Intern., Inc.]*, 761 F.2d [76,] 78 [1st Cir. 1985]. "The notice requirement is not a technical wrinkle or superfluous formality that federal courts may waive at will. . . . [I]t is part of the jurisdictional conferral from Congress that cannot be altered by the courts." *Id.* at 79.

*Hallstrom v. Tillamook County, supra*, 844 F.2d at 600; *see also McGregor v. Industrial Excess Landfill, Inc.*, 856 F.2d 39, 43 (6th Cir. 1988); *Walls v. Waste Resource Corp.*, 761 F.2d 311, 316 (6th Cir. 1985); *City of Highland Park v. Train*, 519 F.2d 681, 691 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976).

This Court has not expressly interpreted the notice requirements of RCRA. However, in *Middlesex Cty. Sewerage Auth. v. Sea Clammers*, 453 U.S. 1 (1981), this Court ruled that the comprehensive enforcement provisions of the Federal Water Pollution Control Act (33 U.S.C. § 1251 *et seq.*) and the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. § 1401 *et seq.*) are intended to be exclusive and that the citizen-plaintiffs involved in that matter were not entitled to maintain any lawsuit or action under any legal theory except in the manner set forth in those statutes. 453 U.S. at 18. With respect to the jurisdictional character of the notice provisions in those statutes that are virtually identical to the notice provision in RCRA (*see* 453 U.S. at 6-7 n. 9), this Court ruled:

> These citizen-suit provisions authorize private persons to sue for injunctions to enforce these statutes. Plaintiffs invoking these provisions first must comply with specified procedures – which respondents here ignored – including in most cases 60 days' prior notice to potential defendants.



453 U.S. at 14 (footnote omitted).

This Court in *Middlesex* did not address the consequences of failing to give such notice. The Hallstroms, however, erroneously contend that "the language this Court chose, *i.e.*, 'specified procedures,' suggests that notice is a procedural, rather than a jurisdictional, requirement." (Op. Br. 34) The clear implication of *Middlesex* is that the notice requirements set forth in federal environmental statutes have jurisdictional significance and that citizen-plaintiffs who intend to maintain an action under those statutes must strictly comply with those requirements. Indeed, both the First Circuit in *Garcia v. Cecos Intern., Inc., supra*, 761 F.2d at 80, and the Sixth Circuit in *Walls v. Waste Resource Corp., supra*, 761 F.2d at 316-17, expressly stated that their respective rulings that the 60-day RCRA notice requirement is jurisdictional were consistent with the approach of this Court in *Middlesex*.

Those courts that allow a stay or otherwise attempt to remedy a citizen lawsuit not commenced in compliance with RCRA in effect sanction the maintenance of a federal lawsuit beyond the scope provided by Congress.[7] That

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[7] *See, e.g., Proffitt v. Commissioners, Bristol TP.*, 754 F.2d 504 (3d Cir. 1985); *Hempstead Cty. & Nevada Cty. Project v. U.S.E.P.A.*, 700 F.2d 459 (8th Cir. 1983); *Pymatuning Water Shed*

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approach has no support in the plain, unambiguous language of RCRA. Accordingly, there is no need to even look beyond RCRA's unambiguous terms to its legislative history. *See TVA v. Hill*, 437 U.S. 153, 184 n. 29 (1977), *citing, Ex Parte Collett*, 337 U.S. 55, 61 (1949).

**3. The requirements of the RCRA notice provision are not subject to waiver, estoppel or other equitable modification.**

The Hallstroms erroneously contend that this Court's decisions in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), and its progeny suggest that the notice requirements established in RCRA and other federal environmental statutes should be interpreted flexibly and with regard to equitable considerations. (Op. Br. 34-37) In

(Continued from previous page)

*Citizens Etc. v. Eaton*, 644 F.2d 995 (3d Cir. 1981); *Susquehanna Valley Alliance v. Three Mile Island*, 619 F.2d 231 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981); *Friends of the Earth v. Carey*, 535 F.2d 165 (2d Cir. 1976), *cert. denied*, 434 U.S. 902 (1977). (Op. Br. 24; Am. Br. 11-13, 16-18) Amici perceive in these cases "a willingness of the courts to respond to the exigencies of the case at hand and fashion a result that best serves the interests of justice." (Am. Br. 19) What Amici perceive, and apparently endorse, as result-oriented jurisprudence is in fact nothing more than the erroneous perception of certain courts that actual knowledge by the EPA and the coordinate state agency of a citizen-plaintiff's claim before the lawsuit is commenced amounts to substantial compliance with the RCRA notice requirement. That approach is inconsistent with the explicit provisions of the RCRA notice requirement and, in any event, has no relevance to this matter. Neither the EPA nor the DEQ in this matter had actual knowledge or formal, written notice of the Hallstroms' intent to sue under RCRA *before* the Hallstroms commenced their citizen suit.



*Zipes*, this Court held that the requirement of a timely filing of a charge of discrimination with the Equal Employment Opportunity Commission pursuant to 42 U.S.C. § 2000e-5(e) is not a jurisdictional prerequisite to a suit in district court. This Court reasoned that that time deadline, like a statute of limitation, was subject to equitable considerations such as waiver and tolling. 455 U.S. at 393.

In contrast, in this matter this Court is not confronted with statutory requirements that, like a statute of limitation, potentially raise an absolute bar to a party's right to pursue a remedy in federal court. A literal interpretation of the RCRA notice requirement at most will delay a citizen's right to sue under RCRA and, in fact, may entirely obviate the need to pursue an action if regulatory authorities are allowed the opportunity to resolve the dispute nonjudicially in the manner contemplated by Congress. Thus, equitable considerations offer no persuasive justification for ignoring the explicit prohibition by Congress on the commencement of actions by citizens prior to compliance with the RCRA notice requirement. *See Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 149-50 (1984) [declining to depart from or modify Fed. R. Civ. P. 3 in determining when an action is "commenced" under 42 U.S.C. § 2000e-5(f)].

In any event, the Hallstroms erroneously contend that, "[u]nder the facts [of this matter], the [60-day notice] requirement was either waived or subject to equitable modification or cure." (Op. Br. 36) Even if the lack of jurisdiction could somehow be waived, the County clearly did not waive anything. The County filed its Motion for Summary Judgment on the jurisdictional issue

immediately after it discovered that, contrary to the allegations in the Hallstroms' Complaint, the Hallstroms had not given notice as required by RCRA. In addition, the County carefully preserved that issue before the district court and raised it on cross-appeal. Thus, there has been no waiver of that issue by the County and the County should not be deemed to be estopped from asserting that jurisdictional defect. Neither should any action or inaction on the part of EPA or DEQ constitute waiver or estoppel, as neither agency was a party to the Hallstroms' lawsuit and neither can waive the jurisdictional requirement or estop the County.

### B. The legislative history underlying RCRA and other federal environmental statutes confirms the clear meaning of the statutory requirements for commencing a citizen suit.

Even if this Court chooses to consider the legislative history underlying RCRA and other federal environmental statutes, that history clearly shows that the notice requirement is an intentional and integral part of the overall statutory scheme established by Congress. Nothing in that legislative history justifies disregard of the plain, unambiguous language used by Congress in the RCRA notice provision.

#### 1. Congress' intention was to establish a hierarchy of preferred responses, and the notice requirement is a key element in achieving that goal.

Both sides and Amici agree that "the court should interpret the statute [RCRA] to carry into effect the end



Congress wanted to accomplish." (Op. Br. 28) The County certainly does not disagree with the Hallstroms and Amici that citizen-suit provisions were enacted "to encourage citizen participation in the enforcement of environmental legislation *as a supplement to agency enforcement*." (Am. Br. 6, emphasis added) However, the legislative history clearly evidences Congress' intent to establish a three-tier hierarchy for responding to alleged environmental violations: (1) voluntary compliance by the violator after having received the requisite 60-day notice, (2) government enforcement action against the violator [*see* 42 U.S.C. § 6972(b)(2)], and (3) a citizen suit against the violator only *after* the requisite notice has been given, 60 days have expired, and there has been no voluntary compliance or governmental agency action commenced.

The legislative history (even that relied on by the Hallstroms and Amici) makes it clear that the third tier or alternative – the citizen suit – is the *least* preferred of the three tiers or alternatives and cannot be utilized unless and until the other two tiers or alternatives have first been exhausted:

> (1) *Voluntary compliance*
>
> Notice to the violator gives him a chance to bring himself into complete compliance in 60 days. If the violator comes into complete compliance in 60 days and it is absolutely clear that the violation cannot reasonably be expected to recur, then the citizen suit is unnecessary. (Op. Br. 13)

This Court recently recognized that one purpose of a citizen-suit notice provision is to give the alleged violator "an opportunity to bring itself into complete compliance

with the [law] and thus likewise render unnecessary a citizen suit." *Gwaltney of Smithfield v. Chesapeake Bay Found., supra,* 108 S. Ct. at 382-83.

(2) *Government enforcement action*

> Notice of the violation to the government should trigger government action. The Senate Committee Report on the Clean Air Amendments said:
>
> > In order to further encourage and provide for agency enforcement, the Committee has added a requirement that prior to filing a petition with the court, a citizen or group of citizens would first have to serve notice of intent to file such action on the Federal and State air pollution control agency and the alleged polluter.
>
> 116 Cong. Rec. 32,926 (1970).[8] (Op. Br. 13-14)

As Amici aptly state: "Committee members believed that the notice provision would serve to trigger administrative action to remedy the alleged violation, thereby eliminating the need for the private citizen to seek relief in the courts." (Am. Br. 9-10)

[8] It is significant that this legislative history refers to a "notice of intent to file such action." This legislative history is consistent with Regulations promulgated by the EPA. Those Regulations (40 C.F.R. § 254; *see* Op. Br. 4) are included in Appendix "B" to this Brief and explicitly require "notice of intent to file suit," which is how the Hallstroms characterized their notice.



(3) *Citizen suit*

The legislative history that Amici rely on [S. Rep. No. 1196, 91st Cong., 2d Sess. 36-37 (1970) (report of Public Works Committee)] makes it clear that Congress anticipated that government agencies, federal and state, would be "primarily responsible for enforcement" and that private citizens "were encouraged to uncover violations that otherwise might escape notice, and motivate the agencies to take action." (Am. Br. 8) That same legislative history makes it clear that it is only when the government agencies fail to act that citizens should be able to bring their enforcement actions in the form of citizen suits.

However, as Amici correctly note, those federal courts that have considered the notice requirements in the Clean Air Act Amendments and other federal environmental statutes "have consistently recognized that Congress sought to facilitate and encourage citizen involvement while preserving the *primary enforcement role* of the federal and state regulatory agencies and shielding the federal courts from an unmanageable number of citizen suits." (Am. Br. 11, emphasis added) Thus, as Amici even acknowledge, "Congress intended to provide for citizen suits in a manner least likely to clog the courts and most likely to trigger agency enforcement." (*Id.*)

There is nothing in RCRA or in the underlying legislative history that implies that a citizen may resort to a court without first satisfying the explicit notice requirement or that a citizen who has not satisfied the notice requirement may nevertheless commence a lawsuit under RCRA and ask the court to hold the action in abeyance in order for the citizen to comply with the 60-day notice requirement. A citizen (like the Hallstroms) who commences a lawsuit before providing the requisite notice

frustrates the primary and underlying objectives of accomplishing voluntary compliance, triggering appropriate administrative action to remedy the alleged violation, and avoiding unnecessary civil litigation. Indeed, the Court of Appeals in this matter concluded that its ruling serves "the underlying policy aims of encouraging non-judicial resolution of environmental conflicts":

> [O]nce a suit is filed, positions become hardened, parties incur legal fees, and relations become adversarial so that cooperation and compromise is less likely. *Garcia*, [*supra*,] 761 F.2d at 82. The pragmatic approach fails to recognize that "a mere adjustment of the trial date or the filing of a supplemental or amended complaint to cure defective notice cannot restore a sixty-day nonadversarial period to the parties." *Id.*
>
> . . . . .
>
> . . . [I]f a citizen-plaintiff could file a suit under RCRA without following the notice requirements and avoid a motion to dismiss simply by arguing that the EPA or other relevant authority had more than 60 days to act prior to the commencement of trial or discovery proceedings, then, under the realities of modern-day litigation, no one would ever comply with this requirement. We will not attribute to Congress an intent to enact a provision after hours of debate that could be evaded by every potential plaintiff, thus rendering it meaningless.

*Hallstrom v. Tillamook County, supra*, 844 F.2d at 601.

**2. The legislative history underlying RCRA and other environmental statutes demonstrates that the notice requirements were intended to be applied literally.**

The citizen-suit provision in RCRA was modeled on the analogous provision in the Clean Air Act Amend-



ments.[9] The legislative history underlying the Clear Air Act provision shows that Congress intended the notice provision to play a significant role. Even proponents of citizen participation in connection with the Clean Air Act were concerned that private-enforcement lawsuits could interfere with the enforcement responsibilities delegated to governmental authorities. *See Hearings on S.3229, S.3466 and S.3546 Before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works*, 91st Cong., 2d Sess. 1184 (1970). Opponents of citizen enforcement were concerned that citizen lawsuits would foster unproductive adversary relations between public, business and private factions. *Id.* at 1570. The 60-day notice requirement was intended to reconcile those concerns with the perception that citizens and government authorities working together could more effectively resolve environmental disputes than through immediate resort by citizens to the courts. *See* 116 Cong. Rec. 32,381 (1970).

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[9] 42 U.S.C. § 7604(b)(1). *See also* Section 505(b)(1) of the Federal Water Pollution Control Act, 33 U.S.C. 1365(b)(1); Section 310(d)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9659(d)(1); Section 16(b)(1) of the Deepwater Port Act of 1974, 33 U.S.C. 1515(b)(1); Section 11(g)(2) of the Endangered Species Act of 1973, 16 U.S.C. 1540(g)(2); Section 105(g)(2) of the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. 1415(g)(2); Section 12(b)(1) of the Noise Control Act of 1972, 42 U.S.C. 4911(b)(1); Section 23(a)(2) of the Outer Continental Shelf Lands Act, 43 U.S.C. 1349(a)(2); Section 1449(b)(1) of the Safe Drinking Water Amendments of 1977, 42 U.S.C. 300j-8(b)(1); Section 520(b)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1270(b)(1); Section 20(b)(1) of the Toxic Substances Control Act, 15 U.S.C. 2619(b)(1); Section 11(b)(1) of an Act to Prevent Pollution from Ships, 33 U.S.C. 1910(b)(1).

Based on its review of the underlying legislative history, the Court of Appeals correctly concluded in this matter that "[n]on-judicial resolution of such conflicts is more likely if parties consider their interests and positions in a nonadversarial setting before suit is filed" and that "[l]itigation should be a last resort only after other efforts have failed":

> Section 6972(b) and its legislative history reflect Congress's belief that the citizen-plaintiff working with the state or the EPA can better resolve environmental disputes than can the courts. *Congress believed that citizen enforcement through the courts should be secondary to administrative enforcement by the EPA.* The notice requirement of § 6972(b) was intended to "trigger administrative action to get the relief that [the citizen] might otherwise seek in the courts." 116 Cong. Rec. 32,927 (1970).

*Hallstrom v. Tillamook County, supra,* 844 F.2d at 601 (emphasis added); *accord Walls v. Waste Resource Corp., supra,* 761 F.2d at 317 ("the legislative history shows that far from being a mere formality, prior notice was viewed by Congress as crucial in defining the proper role of the citizen suit").

The legislative history does not suggest, much less establish, persuasive grounds to disregard the statutory prohibition against a citizen's commencement of a lawsuit before complying with explicit notice requirements. The comments of one sponsor of the Bill that became the Clean Air Act citizen-suit provision capture the intent of the legislation's proponents to allow citizen participation *only after* notice has been given and government enforcement mechanisms have had an opportunity to respond:



> [B]efore any citizen can bring an action, he is required to notify the enforcement agency concerned of his intent to do so, and the specific, alleged violation which he has in mind. In other words, the idea is to use citizens to trigger the enforcement mechanism. If that enforcement mechanism does not respond, then the citizen has his right to go to court.

116 Cong. Rec. 33,103 (1970) (remarks of Senator Muskie), cited in *Hallstrom v. Tillamook County, supra,* 844 F.2d at 601.

### 3. Congressional amendments to RCRA support the conclusion that the notice requirement may not be waived or otherwise satisfied after commencement of a citizen suit.

Congress amended the RCRA citizen-suit provision in 1984 (after the Hallstroms' lawsuit was filed) to extend to citizens the right to sue immediately after giving notice where the perceived threat involves RCRA hazardous waste management standards.[10]

Congress did not alter the 60-day notice requirement where, as here, a citizen sues in regard to the solid waste provisions of RCRA. Congress' deliberate choice in 1984 to modify some, but not all, prerequisites applicable to

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[10] 42 U.S.C. § 6972(b)(1) was amended in 1984 (over two years after this lawsuit was filed) to provide for an exception that waives the 60-day notice requirement if the alleged violation involves hazardous waste. That amendment, however, does not apply to this matter. (J.A. 3, 35-36, 60-62, 67-68) *See, also, Hallstrom v. Tillamook County, supra,* 844 F.2d at 600-01 ("[t]his provision makes clear that Congress considered the 60-day notice requirement and intended that it apply in all cases, except those involving hazardous waste").

RCRA citizen suits is further proof that Congress intended the other terms of the RCRA citizen-suit provision to remain intact as originally and literally enacted.

This Court has cautioned that "[g]oing behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously' even under the best of circumstances." *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982), *quoting Piper v. Chris-Craft Industries*, 430 U.S. 1, 26 (1977). In this matter, no reason exists for this Court to even consider the legislative history underlying the plain, unambiguous language of the RCRA citizen-suit provision. However, even if this unnecessary step is taken, nothing in the legislative history indicates congressional intent demonstrably at odds with Congress' chosen statutory language.

### C. Federal courts may not deviate from explicit statutory requirements established by Congress.

To ignore the plain, unambiguous language of the RCRA notice requirement or even the underlying legislative history in order to construe RCRA in a manner asserted by the Hallstroms and Amici would be to take this Court "out of the realm of interpretation and place [it] in the domain of legislation." *U.S. v. Locke, supra*, 471 U.S. at 96. Moreover, the constitutional structure of our government prohibits the federal courts from assuming that role.



#### 1. The explicit requirements of the RCRA notice provision must be literally applied regardless of the effect on the Hallstroms' lawsuit.

The plain, unambiguous language of and legislative history underlying the RCRA notice requirement are clear. The consequence of the Hallstroms' failure to comply with that requirement should not be mitigated by reading into RCRA a degree of flexibility that simply is not present in the statutory language chosen by Congress. Indeed, strict adherence to the procedural requirements established by Congress has proven to be the best guarantee of evenhanded administration of the law. *See Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980).

The Hallstroms and Amici suggest that a literal interpretation of the RCRA notice requirement will have a detrimental effect on the ability of citizens to enforce federal environmental laws. However, if a literal interpretation of the RCRA notice requirement leads to a harsh result,[11] the harshness "is imposed by the legisla-

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[11] Amici focus on the Endangered Species Act as a "striking example of the absurd and harsh results of a formalistic jurisdictional rule." (Am. Br. 26-30) According to Amici, inflexible enforcement of the 60-day waiting period could result in the extinction of an endangered species that might have been avoided had a district court possessed the authority to waive or modify the waiting requirement. (Am. Br. 29). That argument, however, fails to take into account that the Endangered Species Act, like RCRA, does not purport to preempt other remedies that may be available to a particular citizen. *See* 16 U.S.C. § 1540(g)(5); 42 U.S.C. § 6972(f). Thus, the imposition of a 60-day waiting period for purposes of the Endangered Species Act does not affect a citizen's ability to invoke other statutory or common-law procedures for seeking immediate relief.

ture and not by the judicial process." *See Torres v. Oakland Scavenger Co.*, ___ U.S. ___, 108 S. Ct. 2405, 2409 (1988) (holding that specification of parties in a notice of appeal is a jurisdictional prerequisite), *quoting Schiavone v. Fortune*, 477 U.S. 21, 31 (1986). Indeed, this Court has recognized that statutory procedures established by Congress for gaining access to the federal courts are not to be disregarded by the courts out of sympathy for particular litigants. *See Baldwin County Welcome Center v. Brown*, *supra* 466 U.S. at 152.

**2. Congress, not the federal courts, is constitutionally empowered to define the circumstances under which a citizen may sue to enforce federal environmental statutes.**

The Hallstroms and Amici essentially ask this Court to rewrite the RCRA notice requirement and thereby legislate in a manner reserved to Congress by Article I of the Constitution. This Court has repeatedly rejected arguments that would require it to extend its constitutionally-assigned role. For example, in *TVA v. Hill*, *supra*, several environmental groups brought an action under the Endangered Species Act of 1973 to enjoin the Tennessee Valley Authority from completing the Tellico Dam. The environmental groups argued that completion of the Dam would eradicate an endangered species of snail darter or destroy its critical habitat. This Court held that the Endangered Species Act prohibited further work on the Dam even though the Dam was virtually complete and Congress continued to appropriate public funds toward the project after being apprised of the Dam's probable impact on the snail darter's survival. 437 U.S. at 171-95.



Significantly, this Court in *TVA v. Hill* refused to ignore the statute's plain language even though its literal application would terminate the Tellico Dam project and sacrifice millions of dollars in public funds. In affirming the entry of an Order directing the district court to permanently enjoin further work on the project, this Court reasoned:

> Our system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution. While "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 1 Cranch 137, 177 (1803), it is equally – and emphatically – the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.
>
> . . . . .
>
> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto. . . .
>
> We agree with the Court of Appeals that in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "common sense and the public weal." Our Constitution vests such responsibilities in the political branches.

437 U.S. at 194-95; *see also Mohasco Corp. v. Silver, supra,* 447 U.S. at 826 (courts may not "alter the balance struck by Congress" by favoring one side or another in matters of statutory construction).

This Court's decision in *TVA v. Hill* reflects nothing less than "a profound respect for the law and the proper allocation of lawmaking responsibilities in our Government." *See Weinberger v. Romero-Barcelo,* 456 U.S. 305, 334-35 (1982) (Stevens, J., dissenting, footnote omitted). That respect also should lead this Court to reject the argument of the Hallstroms and Amici that Congress meant something other than what it enacted in the RCRA notice provision. The literal terms and the underlying legislative history of that provision simply do not authorize a stay or any other judicial effort to remedy a citizen suit commenced before the statutory notice requirement has been met. Articles I-III of the Constitution and the separation of powers doctrine prevent this Court from reaching a contrary result.



## CONCLUSION

This Court should affirm the decision of the Court of Appeals and the case should be remanded to the district court for dismissal.

Respectfully submitted,

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# APPENDICES

# APPENDIX A

*Section 7002 of the Resource Conservation and Recovery Act of 1976, 90 Stat. 2825, 42 U.S.C. § 6972 (1982 ed., Supp. III)*

**§ 6972. Citizens suits**

**(a) In general**

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf -

(1) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Any action under paragraph (a)(l) of this subsection shall be brought in the district court for the district in which the alleged violation occurred. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such regulation or order, or to order the Administrator to perform such act or duty as the case may be.

(b) Actions prohibited

No action may be commenced under paragraph (a)(1) of this section –

(1) prior to sixty days after the plaintiff has given notice of the violation (A) to the Administrator; (B) to the State in which the alleged violation occurs; and (C) to any alleged violator of such permit, standard, regulation, condition, requirement, or order; or

(2) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, or order; *Provided, however,* That in any such action in a court of the United States, any person may intervene as a matter of right.

(c) Notice

No action may be commenced under paragraph (a)(2) of this section prior to sixty days after the plaintiff has given notice to the Administrator that he will commence such action, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation. Any action respecting a violation under this chapter may be brought under this section only in the judicial district in which such alleged violation occurs.

(d) Intervention

In any action under this section the Administrator, if not a party, may intervene as a matter of right.



(e) Costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(f) Other rights preserved

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).

# APPENDIX B

*EPA Regulations on Prior Notice of Citizen Suits under RCRA, 40 C.F.R. § 254*

## PART 254 - PRIOR NOTICE OF CITIZEN SUITS

AUTHORITY: Sec. 7002, Pub. L. 94-580, 90 Stat. 2825 (42 U.S.C. 6972).

SOURCE: 42 FR 56114, Oct. 21, 1977, unless otherwise noted.

### § 254.1 Purpose.

Section 7002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, authorizes suit by any person to enforce the Act. These suits may be brought where there is alleged to be a violation by any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) of any permit, standard, regulation, condition, requirement, or order which has become effective under the Act, or a failure of the Administrator to perform any act or duty under the Act, which is not discretionary with the Administrator. These actions are to be filed in accordance with the rules of the district court in which the action is instituted. The purpose of this part is to prescribe procedures governing the notice requirements of subsections (b) and (c) of section 7002 as a prerequisite to the commencement of such actions.

### § 254.2 Service of notice.

(a) Notice of intent to file suit under subsection 7002(a)(1) of the Act shall be served upon an alleged

violator of any permit, standard, regulation, condition, requirement, or order which has become effective under this Act in the following manner:

(1) If the alleged violator is a private individual or corporation, service of notice shall be accomplished by registered mail, return receipt requested, addressed to, or by personal service upon, the owner or site manager of the building, plant, installation, or facility alleged to be in violation. A copy of the notice shall be mailed to the Administrator of the Environmental Protection Agency, the Regional Administrator of the Environmental Protection Agency for the region in which the violation is alleged to have occurred, and the chief administrative officer of the solid waste management agency for the State in which the violation is alleged to have occurred. If the alleged violator is a corporation, a copy of the notice shall also be mailed to the registered agent, if any, of that corporation in the State in which such violation is alleged to have occurred.

(2) If the alleged violator is a State or local agency, service of notice shall be accomplished by registered mail, return receipt requested, addressed to, or by personal service upon, the head of that agency. A copy of the notice shall be mailed to the chief administrator of the solid waste management agency for the State in which the violation is alleged to have occurred, the Administrator of the Environmental Protection Agency, and the Regional Administrator of the Environmental Protection Agency for the region in which the violation is alleged to have occurred.



(3) If the alleged violator is a Federal agency, service of notice shall be accomplished by registered mail, return receipt requested, addressed to, or by personal service upon, the head of the agency. A copy of the notice shall be mailed to the Administrator of the Environmental Protection Agency, the Regional Administrator of the Environmental Protection Agency for the region in which the violation is alleged to have occurred, the Attorney General of the United States, and the chief administrative officer of the solid waste management agency for the State in which the violation is alleged to have occurred.

(b) Service of notice of intent to file suit under subsection 7002(a)(2) of the Act shall be accomplished by registered mail, return receipt requested, addressed to, or by personal service upon, the Administrator, Environmental Protection Agency, Washington, D.C. 20460. A copy of the notice shall be mailed to the Attorney General of the United States.

(c) Notice given in accordance with the provisions of this part shall be considered to have been served on the date of receipt. If service was accomplished by mail, the date of receipt will be considered to be the date noted on the return receipt card.

§ 254.3 Contents of notice.

(a) *Violation of permit, standard, regulation, condition, requirement, or order.* Notice regarding an alleged violation of a permit, standard, regulation, condition, requirement, or order which has become effective under this Act shall include sufficient information to permit the recipient to identify the specific permit, standard, regulation, condition, requirement, or order which has allegedly been

violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the date or dates of the violation, and the full name, address, and telephone number of the person giving notice.

(b) *Failure to act.* Notice regarding an alleged failure of the Administrator to perform an act or duty which is not discretionary under the Act shall identify the provisions of the Act which require such act or create such duty, shall describe with reasonable specificity the action taken or not taken by the Administrator which is claimed to constitute a failure to perform the act or duty, and shall state the full name, address, and telephone number of the person giving the notice.

(c) *Identification of counsel.* The notice shall state the name, address, and telephone number of the legal counsel, if any, representing the person giving the notice.